

**IN THE EMPLOYMENT RELATIONS AUTHORITY  
AUCKLAND**

**I TE RATONGA AHUMANA TAIMAHI  
TĀMAKI MAKĀURAU ROHE**

[2021] NZERA 412  
3111658

BETWEEN YUDHISH KHATRI  
Applicant

AND COUNTIES MANUKAU  
DISTRICT HEALTH BOARD  
Respondent

Member of Authority: Peter Fuiava

Representatives: Simon Greening, counsel for the Applicant  
Rebecca Rendle, counsel for the Respondent

Investigation Meeting: 1 June 2021

Submissions received: 2, 17 June 2021 from Applicant  
4 June 2021 from Respondent

Determination: 23 September 2021

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**DETERMINATION OF THE AUTHORITY**

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**A. Mr Khatri was not unjustifiably dismissed from his employment with Counties Manukau District Health Board.**

**B. Costs are reserved.**

**Employment relationship problem**

[1] In September 2019, Mr Khatri applied for the position of Systems Administrator – Feedback Central with Counties Manukau District Health Board (the DHB). In support of his job application, he provided the DHB with a copy of his *curriculum vitae* (CV) in which it was recorded that he had a Bachelor of Engineering (Hons). However, although Mr Khatri had started studying towards an Engineering degree in 2011, he had not in fact completed it.

[2] Herein lies the core of this employment relationship problem because Mr Khatri was subsequently employed by the DHB but was dismissed shortly thereafter for misrepresenting that he had a Bachelor of Engineering. Mr Khatri says that he made an innocent blunder with his CV and that he should have marked his Bachelor of Engineering as being an incomplete qualification. Mr Khatri says that the DHB's decision to dismiss him was unfair and unreasonable for two reasons, first a Bachelor of Engineering was not essential to his employment and second, he was offered the advisor role on the basis of his work experience.

### **Relevant facts**

[3] In mid-September 2019 Mr Khatri applied for the role of systems administrator for the DHB's Feedback Central division. This was a full-time salaried position of \$55,000 per year. In support of his job application, Mr Khatri provided a copy of his CV which stated:

#### Education and Qualifications

AUT University, Auckland – Bachelor of Engineering (Hons)  
March 2011 – November 2015  
Specialisation: Embedded Electronics Engineering

### **Job interview**

[4] By email of 18 September 2019, Mr Khatri was invited to a job interview for the administrator position and he was advised to bring with him a number of documents which included a DHB health declaration document (the declaration statement), police vetting form, attested copies of his qualifications, and two documents verifying his identity.

[5] On 23 September 2019, Mr Khatri was interviewed by Ms Diana Dowdle, Feedback Central Manager for the DHB. She asked Mr Khatri why he was not working in Engineering and he replied that he had lost interest in the field. He did not disclose to her that he had not completed his Bachelor of Engineering. At some point during the interview, Mr Khatri signed the declaration statement, affirming to Ms Dowdle that the information and supporting documents he had provided were true and correct.

[6] Towards the end of the interview, Ms Dowdle mentioned to Mr Khatri that there was a more senior role that was being advertised of Systems Advisor – Feedback Central. She asked whether he would be interested in the role if he was unsuccessful

with the administrator position. Mr Khatri indicated that he was. The interview ended with Mr Khatri providing Ms Dowdle with several documents but unbeknownst to her, she had not been provided with a copy of his qualifications.

[7] On 2 October 2019, Ms Dowdle telephoned Mr Khatri to advise him that he was unsuccessful for the administrator role. There had been a temp who had been in the team for some time and who was already familiar with the DHB's systems. Ms Dowdle advised Mr Khatri that she considered him to be overqualified for the role and suggested that he would be more suitable for the advisor position. Mr Khatri indicated that he was interested in applying and he was given advice as to where he could find the advertisement and the relevant job description. Ms Dowdle explained to Mr Khatri that he would not need to be re-interviewed.

[8] On 8 October 2019, Mr Khatri was verbally offered the role of Systems Advisor which he accepted. This was a fixed-term full-time position with a salary of \$76,000 per year.

[9] On 15 October 2019, Mr Khatri was emailed his individual employment agreement which included a position description which stated that a tertiary or vocational qualification or three years' relevant work experience was essential.

[10] On 29 October 2021, Mr Khatri commenced working for the DHB. However, shortly afterwards, Ms Dowdle realised that she did not have a copy of his engineering degree.

[11] On 1 November 2019, Ms Dowdle met with Mr Khatri and requested a copy of his qualification. There is a dispute as to what he said in response. Mr Khatri stated that he could not provide her with evidence of his Bachelor of Engineering because he had not completed it. Ms Dowdle stated that Mr Khatri's response was that he had not got around to graduating which gave her the impression he had otherwise completed the degree.

[12] Ms Dowdle followed up her request with Mr Khatri on 4 November 2019 and gave him the following day off so that he could provide her with a copy of his academic transcript.

[13] On 6 November 2019, Mr Khatri provided Ms Dowdle with an access code with which she was able to view his academic transcript online. She subsequently learnt that he had not completed his Bachelor of Engineering and that he had failed Engineering Computations II in 2012, not completed Industrial Project (Electrical) and had withdrawn from Digital Signal Processing in 2014, and that he had failed Industrial Project (Electrical) in 2015.

### **Disciplinary process**

[14] On 7 November 2019 Ms Dowdle had an informal meeting with Mr Khatri to discuss with him her concerns about his CV. Also present at that meeting was Melissa Cochrane, an HR advisor for the DHB, who took handwritten notes which were later typed. Mr Khatri was advised that he would be working alternative duties while matters were investigated further.

[15] By letter of 8 November 2019 Mr Khatri was invited to attend a disciplinary meeting for which he could bring a legal or a union representative and a support person. The letter contained the following allegations against Mr Khatri:

- You have undermined the trust and confidence essential to an employment relationship by misrepresenting yourself on your resume.
- You have been dishonest in your resume specifically citing you have a "*Bachelor of Engineering (Hons) Specialisation: Embedded Electronics Engineering*". Upon asking for a copy of this qualification for your employee file you admitted that you had failed to complete this qualification

### **Disciplinary meeting**

[16] Mr Khatri's disciplinary meeting took place on 13 November 2019. He and Ms Dowdle and Ms Cochrane were present. Mr Khatri was comfortable for the meeting to proceed without a representative or support person present. As she had done before, Ms Cochrane took notes.

[17] In explaining his CV, Mr Khatri acknowledged that he could have worded it better. He had written his resume in 2015 when he was still studying Engineering and he had three people review his CV for him, none of whom found it to be in error. However, Mr Khatri had recently visited the Citizens Advice Bureau and they were of the view that his resume was misleading and unclear.

[18] When asked why he had not disclosed when interviewed that he had not completed his engineering qualification, Mr Khatri stated that he provided the bare minimum and that he did not offer more information than was needed. He had initially applied for the administrator role and did not know that he needed a degree for the second role of systems advisor. Mr Khatri accepted that he had “wrecked” the trust and confidence Ms Dowdle had in him but he was willing to repair the relationship and even renegotiate his salary.

### **Preliminary decision**

[19] On 18 November 2019, Ms Dowdle advised Mr Khatri in writing of her preliminary decision that he be summarily dismissed. Briefly stated, she had taken into account his responses as described above, but considered that his actions amounted to serious misconduct under the DHB’s health discipline and dismissal policy. The two allegations against Mr Khatri were substantiated but before finalising her decision, Ms Dowdle provided Mr Khatri a further opportunity to respond to her preliminary findings.

[20] On 2 December 2019, Ms Dowdle, Ms Cochrane, a second HR associate, Mr Khatri and his two legal representatives met in person. Minutes of that meeting were taken during which Mr Khatri’s counsel Mr Greening explained that although the setup of the CV was unfortunate, the skill set was there and Mr Khatri was two papers short of completing his degree.

[21] Mr Greening referred to the DHB’s recruitment policy at cl 7.1 that stated that evidence of the requisite qualification or certification needed to be provided before an offer of appointment was made. As to the health declaration statement that Mr Khatri signed, the DHB was not duty bound to terminate Mr Khatri’s employment. Finally, while trust and confidence had been broken, Mr Greening questioned whether it had reached the degree of termination of employment.

[22] By letter of 4 December 2019 Ms Dowdle advised Mr Khatri of her final decision which was to dismiss him without notice. The letter relevantly states:

After considering all the information available to me including your responses as summarised above, our decision is that your employment should be terminated, effective immediately. In making our decision we took into account your willingness to rebuild trust and confidence, your apology and offer to renegotiate the terms and conditions of your employment contract. We

also acknowledge that you may or may not have been aware that a degree or 3 years relevant experience was required for the role before accepting the verbal offer; however you subsequently signed the job description which clearly stated this requirement in full knowledge that the qualification stipulated on your resume was incomplete and you had not declared this. It was made clear to you both this offer and salary was based on this qualification at which point you also failed to disclose this inaccuracy. Regardless, the allegations are that of trust and confidence, dishonesty and misrepresentation in relation to your resume which have been substantiated.

Due to the sensitive nature of work, redeployment or alternative work duties was not a suitable option, noting that we did place you on alternative duties at the beginning of this investigation period and the workload was not sufficient enough to constitute a full time role for the remainder of your fixed term contract. Allowing you to continue working in such an environment would pose a risk to the organisation.

Dismissal was considered to be the appropriate penalty in this instance due to the high level of trust required for this role and confidential nature of your work including the full access of staff and patient information you will be privy to in which trust and confidence is imperative.

[23] On 20 January 2020 Mr Khatri raised his personal grievance against the DHB.

### **The Authority's investigation**

[24] The parties filed witness statements and relevant documents in accordance with timetabling directions. Mr Khatri gave evidence and was the only witness in his case. For the DHB, the Authority heard from Ms Dowdle and Ms Cochrane.

[25] Under oath or affirmation, all witnesses answered questions from the Authority and from counsel. At the end of the investigation meeting, the Authority heard oral closing submissions from Mr Greening and Ms Rendle.

[26] Leave was granted for Mr Khatri to provide additional information regarding his efforts in finding alternative employment. This was provided to the Authority the day after the investigation meeting. Mr Greening and Ms Rendle filed further submissions in response to this additional information.

[27] As permitted by s 174E of the Employment Relations Act 2000 (the Act) this determination has stated findings of fact and law, expressed conclusions on issues necessary to dispose of the matter and specified orders made. It has not recorded all evidence and submissions received.

## **The issues**

[28] The issues requiring investigation and determination are:

- (i) Is a Bachelor of Engineering essential for the role of systems advisor?
- (ii) Could Mr Khatri's previous work experience have substituted for the required qualification?
- (iii) Was Mr Khatri's dismissal on 4 December 2019, and how the DHB reached its decision to dismiss him, what a fair and reasonable employer could have done in all the circumstance at the time?

### **A tertiary or vocational qualification is essential**

[29] The relevant person specification makes clear that, in terms of qualifications, a tertiary or vocational qualification is "essential" for the systems advisor role. While there is no express reference to a Bachelor of Engineering needing to be required, this is of no moment when any tertiary or vocational qualification would do, including but not limited to, a Bachelor of Engineering.

[30] When Mr Khatri applied for the administrator and advisor roles, he had no other tertiary or vocational qualification to his name apart from an incomplete Bachelor of Engineering. His highest qualification at that time was NCEA Level 3 which was well short of the level of learning required for a tertiary or vocational qualification.

### **Previous work experience not directly relevant**

[31] The fact that Mr Khatri did not have a tertiary or vocational qualification was not fatal to his job application provided he was able to demonstrate that he had three years of relevant work experience to substitute the requisite qualification. However, Mr Khatri's work experience as an IT contractor for Subway was not directly relevant to the advisor role. He had not previously worked for the DHB and had no knowledge or experience of its IT and administration systems. Nor did he have knowledge or an understanding of medico/legal and ethical responsibilities which was expected of a systems advisor. Finally, Mr Khatri would be expected to work and liaise with people with whom he had no prior experience of working with such as the Chief Medical Officer, coroners, clinical directors, the Health and Disability Commission, and ACC.

[32] I prefer the evidence of Ms Dowdle. She stated that it was Mr Khatri's Bachelor of Engineering that caught her attention. Her line of questioning at Mr Khatri's job interview and subsequent telephone conversation with him on 2 October 2019 satisfies

me that the appointment was made on the basis of his tertiary qualification or Bachelor of Engineering degree.

### **Whether Mr Khatri was unjustifiably dismissed?**

[33] The onus is the DHB to show that, at the time of the dismissal, its actions were what a fair and reasonable employer could have done in all the circumstances. Section 103A of the Act sets out the test of justification:

#### 103A Test of justification

- (1) For the purposes of section 103(1)(a) and (b), the question of whether a dismissal or an action was justifiable must be determined, on an objective basis, by applying the test in subsection (2).
- (2) The test is whether the employer's actions, and how the employer acted, were what a fair and reasonable employer could have done in all the circumstances at the time the dismissal or action occurred.

[34] It was submitted on Mr Khatri's behalf that he was terminated for serious misconduct which was not an action the DHB could take because:

- (a) The duty of good faith only applies to parties in an employment relationship. It does not apply to applicants for positions with a prospective employer.<sup>1</sup>
- (b) Pre-employment conduct cannot amount to serious misconduct justifying summary dismissal.<sup>2</sup>

[35] In her preliminary decision letter of 18 November 2019 (see above at [19]), Ms Dowdle initially considered that Mr Khatri's conduct amounted to serious misconduct. However, this was not the reason why she dismissed him in the end. In her termination of employment letter of 4 December 2019, Ms Dowdle dismissed Mr Khatri because his position as systems advisor required a high level of trust especially as he would have full access to staff and patient information. She had lost trust and confidence in him to the extent that allowing Mr Khatri to continue working in such an environment would pose a risk to the organisation.

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<sup>1</sup> *Hayden v Wellington Free Ambulance Service* [2002] 1 ERNZ 399 at [27].

<sup>2</sup> *Murray v Attorney-General* [2002] 1 ERNZ 184.

[36] I find that there were multiple occasions where Mr Khatri could have been more honest, candid and straightforward with Ms Dowdle but was not. This included:

- (i) At his job interview, where he gave Ms Dowdle the impression that he had lost interest working as an engineer when in reality he had not completed his Bachelor of Engineering;
- (ii) Signing the health declaration statement which added to Ms Dowdle's mistaken belief that his CV was true and correct when it was not;
- (iii) By not correcting Ms Dowdle when she called Mr Khatri on 2 October 2019 and said that he was overqualified for the administrator role. Clearly, she was referring to his Bachelor of Engineering which he did not in fact have; and
- (v) By signing the individual employment agreement which included a position description that clearly stated that a tertiary or vocational qualification or three years' relevant work experience was required for the advisor role.

[37] When cumulatively considered, Mr Khatri's lack of candour and honesty with Ms Dowdle on multiple occasions was such that any fair and reasonable employer would have lost trust and confidence in him and dismissed him as a result. In light of the confidential and sensitive information that a systems advisor would become privy to in the ordinary course of their employment, Ms Dowdle needed to have a high level of trust in Mr Khatri which she reasonably no longer had.

[38] The Employment Court decisions in *Hayden* and *Murray* do not advance matters for Mr Khatri in my view as Mr Khatri was dismissed on trust and confidence being damaged beyond repair. In *Murray*, Chief Judge Goddard found that there was no general duty on job seekers to reveal relevant material about themselves voluntarily, but if an employer has asked and the prospective employee has chosen to answer, the answer must be honest and full.<sup>3</sup> Applying *Murray* to the present case, and responding

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<sup>3</sup> *Murray v A.G* at [44].

to Mr Khatri's tendency to provide the bare minimum response to questions, when he said he had lost interest in working as an engineer, an honest and full response required him to make clear that he had not completed his Bachelor of Engineering.

### **Contract and Commercial Law Act 2017**

[39] In the alternative, Mr Greening submitted that the DHB could not have cancelled Mr Khatri's contract for misrepresentation because it did not meet the requirements of section 37 of the Contract and Commercial Law Act 2017 (CCLA).

[40] Under s 37 of the CCLA, a party to a contract may withdraw if it has been induced to enter into it by an innocent or fraudulent misrepresentation by or for another party – but only if the parties have agreed that the truth of the representation is essential to their contract, or the effect of the misrepresentation on the arrangement is substantial.

[41] There have been occasions where dismissals have been found to be justified by the Authority for pre-employment misrepresentation without engaging the CCLA (or the repealed Contractual Remedies Act 1979).<sup>4</sup> The present case is of the same kind and Ms Dowdle was influenced by the false information to the extent that she subsequently lost trust and confidence in Mr Khatri when his misrepresentation was discovered.

[42] One residual argument raised on behalf of Mr Khatri was the apparent failure of the DHB to follow its own recruitment policy. At cl 7.1, the hiring manager (Ms Dowdle) was required to obtain evidence of Mr Khatri's qualification or certification before an offer of appointment was made.

[43] As a matter of principle, it must be the case that a fair and reasonable employer would always seek to comply with its own policies. That being said however the policy argument must be seen for what it is; Mr Khatri trying to retain a benefit for which he is not entitled. Had the DHB followed its own policy, he would not have been appointed because he did not have the requisite qualification or three years of relevant work experience to be offered the advisor role.

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<sup>4</sup> *Cui v Vice-Chancellor of the University of Auckland* ERA Auckland, AA14/09, 19 January 2009; *Bourne v Carter Holt Harvey Ltd* [2011] NZERA Auckland 18; *Knedler v Flight Centre (NZ) Limited* [2011] NZERA Christchurch 118.

### **Was the process the DHB followed fair and reasonable?**

[44] The background to the DHB's disciplinary investigation of Mr Khatri is set out at [14] to [22] above and I need not repeat them here again. The DHB is a large employer with a fairly robust HR system. In terms of sections 4(1A) and 103A of the Act, I am satisfied that Mr Khatri was given access to relevant information concerning the continuation of his employment and that he was given a fair and reasonable opportunity to comment on information before the final decision was made. I find that Ms Dowdle's decision to dismiss Mr Khatri to be substantively and procedurally justifiable in terms of the above statutory provisions.

### **Costs**

[45] Costs are reserved. The parties are encouraged to resolve any issue of costs between themselves.

[46] If they are not able to do so and an Authority determination on costs is needed the respondent may lodge, and then should serve, a memorandum on costs within 14 days of the date of issue of the written determination in this matter. From the date of service of that memorandum the applicant would then have 14 days to lodge any reply memorandum. Costs will not be considered outside this timetable unless prior leave to do so is sought and granted.

[47] The parties could expect the Authority to determine costs, if asked to do so, on its usual notional daily rate unless particular circumstances or factors required an upward or downward adjustment of that tariff.<sup>5</sup>

Peter Fuiava  
Member of the Employment Relations Authority

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<sup>5</sup> *PBO Ltd v Da Cruz* [2005] 1 ERNZ 808, 819-820 and *Fagotti v Acme & Co Limited* [2015] NZEmpC 135 at [106]-[108].